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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 29

**THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, Petitioner,**

v.

**UNITED TRANSPORTATION UNION, et al.,
Respondents.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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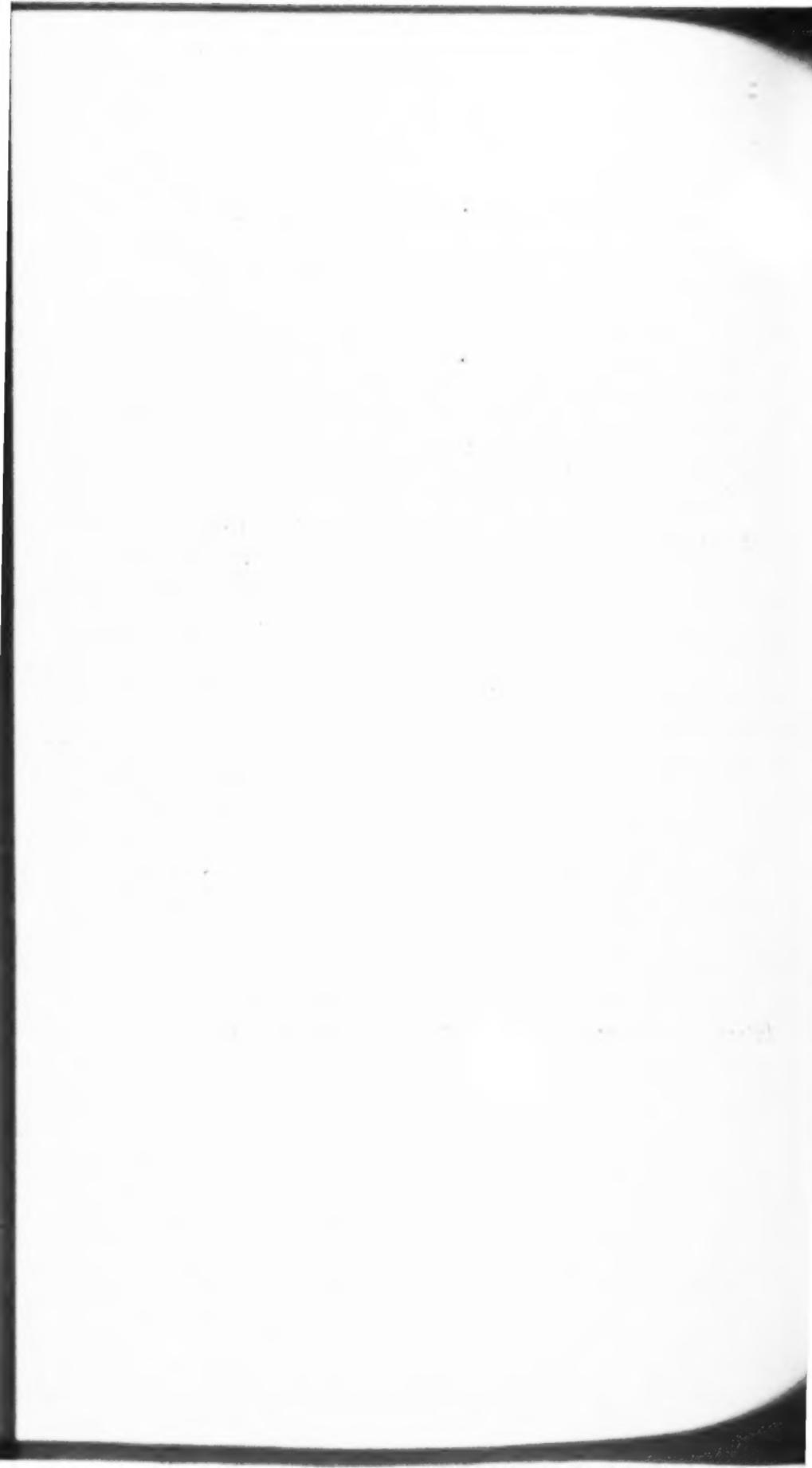
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The question before the Court is whether Section 6 of the Railway Labor Act (45 U.S.C. § 156) precludes a railroad from taking action allowed by its collective bargaining agreement during the pendency of a union proposal to amend the agreement to forbid such action. In our opening brief, we set forth the reasons for our view that Section 6 does not preclude such action and that the status quo provision of that section simply extends the life of the agreement pending negotiations for change. This construction of Section 6, as we have indicated, has been endorsed repeatedly by the National Mediation Board, the agency

charged with responsibility for dealing with railway labor controversies and accordingly the agency in the best position to come to an informed and disinterested judgment on the status quo issue as it affects the public interest. (Br. pp. 14-18.) Moreover, the Board's view of Section 6 is supported by numerous and virtually uniform decisions of the courts, including this Court (Br. pp. 18-28); it accords with the purpose of the Congress, manifested both in the text and scheme of the Railway Labor Act (Br. pp. 28-32) and in the legislative history of Section 6 (Br. pp. 32-40); and it makes sense—the contrary rule followed by the court below would obstruct needed operational changes indefinitely and would stultify collective bargaining (Br. pp. 40-45).

The unions take quite a different, and quite an oblique, approach to the case.¹ As to the National Mediation Board, the unions simply dismiss its judgment as misguided (Resp. Br. pp. 36-37; R.L.E.A. Br. pp. 20-21), so no more need be said about that. As to the statute, they argue that, while the question presented turns upon the meaning of Section 6, the answer is to be found, not in the language and legislative history of that provision, upon which we rely, but rather in the language of two other provisions—Sections 5 and 10—and particularly in the legislative history of the latter. But, as we show in this reply, the status quo provisions of Sections 5 and 10 are not applicable to this case. When they are applicable to a major dispute—after the Mediation Board terminates its services or an emergency board is appointed—they require only that the parties abide by the rules established by their pre-existing agreements. And if that were not the case, the considerations that might lead to a contrary conclusion would serve only to confirm our interpretation of Section 6.

¹ We employ the term "unions" herein to refer both to respondent and amicus, the Railway Labor Executives Association.

We also deal in this reply with collateral arguments of the unions. Thus, we show that the judicial decisions upon which they rely had nothing to do with the scope of the parties' obligation to maintain the status quo, the issue involved in this case, but instead stated only in general terms the incontestible principle that *both* parties to railway labor disputes share that obligation. We also demonstrate the want of merit of the unions' newly devised argument that, even if the decision below is not supported by Section 6 of the Act, it can be supported by Section 2 First, which imposes the duty to bargain on railroads and unions. That contention is not encompassed within the question presented; was neither pleaded nor proved below; is not supported by findings; and cannot be sustained on the record and facts in this case.

1. *The text and history of the Railway Labor Act.* In their briefs, the unions point out, correctly, that there are four status quo provisions in the Railway Labor Act—in Sections 2 Seventh, 5 First, 6 and 10. Section 2 Seventh prohibits changes in "rates of pay, rules, or working conditions . . . as embodied in agreements except in the manner prescribed . . . in Section 6 . . ." (45 U.S.C. § 152 Seventh). Section 6 requires service of a notice of "an intended change in agreements affecting rates of pay, rules, or working conditions," and provides that during the pendency of the notice, the "rates of pay, rules, or working conditions shall not be altered" until "the controversy has been finally acted upon as required by Section 5 . . . by the Mediation Board . . ." (45 U.S.C. § 156). Section 5 First, provides that if mediation fails, the Mediation Board "shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration" and—

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory

efforts have failed and for thirty days thereafter . . . no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." (45 U.S.C. § 155.)

Thereafter, under Section 10, the President may appoint an emergency board, which has thirty days in which to make its report. "After the creation of such board and for thirty days after such board has made its report . . . , no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" (45 U.S.C. § 160).

The unions cannot and do not dispute that the only status quo provisions of the Act which are directly involved in this case are those in Section 2 Seventh and Section 6. The dispute has not reached, and may never reach, the stages which bring into operation the status quo provisions in Section 5 (the termination by the Mediation Board of its services) and in Section 10 (the appointment of an emergency board). So far as this case is concerned, the language and legislative history of, and policy considerations respecting, Sections 2 Seventh and 6, as well as the decision by this Court in *Williams v. Terminal Co.*, 315 U.S. 386 (1942), numerous decisions of lower courts, and the views of the Mediation Board, all support our position that those status quo provisions require only that the parties continue to abide by the rules established by their pre-existing agreements. We dealt with these matters in our opening brief.

The unions rely, however, on the language of the status quo provisions of Sections 5 and 10 and on the legislative history of Section 10—the only history of the 1926 Act dealt with in the unions' briefs (Resp. Br. pp. 11-17)—as aids to the interpretation of Section 6. (See Resp. Br. pp. 8-19; R.L.E.A. Br. pp. 17-20.) But there is nothing in either the language or the legislative history of those provisions that undercuts our view respecting the reach of Section 6.

That is so for two reasons. In the first place, assuming that Sections 6, 5 and 10 should all be read to mean the same thing, so far as their scope is concerned, the only reasonable construction to be placed upon them is that maintenance of the status quo means simply the adherence to pre-existing agreements. And in the second place, even if Sections 5 and 10 somehow could be construed to impose a broader obligation, that could only be justified, as we show below, on grounds that are not applicable to Section 6 and which therefore serve only to confirm our construction of that section. We discuss these points briefly in turn.

a. The unions' primary reliance is upon the language and legislative history of Section 10, which prohibits changes "in the conditions out of which the dispute arose" for 30 days after the appointment of an emergency board and for an additional 30 days after its report. That language is wholly consistent with the position we take respecting Section 6. The "condition" out of which the dispute in this case arose was the right of the Shore Line to establish new reporting points. It was in order to do away with or change that right—that "condition"—that the union served its Section 6 notice. To take that right away from the carrier while the Section 6 notice is being processed through the procedures of the Act thus would in itself change the "conditions" out of which the dispute arose, not preserve those "conditions." Nor does the testimony of Donald Richberg conflict with this reading of Section 10. The only examples of changes in "conditions" put forward by him, other than the calling of strikes or the institution of lockouts, related to situations, such as changes in wages, that normally would involve changes in existing agreements.²

² We believe, moreover, that an examination of all the lengthy explanations made by Mr. Richberg and others concerning the purposes of Section 10, cited in Respondent's Brief (pp. 12, 13, 16, 17 and n. 5) will reveal

As for Section 5, the unions rely upon the reference in that provision to "established practices." Thus, Section 5 provides that "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" for 30 days after the Mediation Board terminates its services. Initially, we note that even if the term "established practices" refers to something other than practices established by express or implied agreements, and even if that term could be read back into Section 6, so as to apply to this major dispute at this time, the Shore Line should win. Prior to the time of service of the Section 6 notice here in question, the Shore Line changed reporting assignments to Dearoad, which was even farther from Lang Yard than is Trenton. For some years, there had been no occasion for the carrier to consider the establishment of outlying assignments prior to the developments that led to the establishment of the Dearoad assignments. See our opening brief at pp. 4-5. Accordingly, the only "established practice" prior to service of the Section 6 notice, however that phrase be read, was that Shore Line established reporting points where it wanted them. If that right was not otherwise "established," it was *conclusively* established by the decision of the Special Board of Adjustment (A. 110).

But in our view the most reasonable construction of Section 5 is that it does not expand the status quo requirements in major disputes, at any stage, beyond the preservation and continuation of contractual rights. In the first place, if it be assumed that the Congress meant the phrase "established practices" to apply to major disputes at all,

that their only real concern was to prevent the parties from resorting to self-help, such as strikes and lockouts, whereby one side would bring economic pressure upon the other so as to coerce the other into an agreement even before the emergency board made its report or during the limited period thereafter—30 days—in which the parties were expected to attempt to settle their dispute in an amicable manner in the light of that report.

the existence of a contractual right, as in the case at bar, "establishes" the "practice" with respect to the subject matter of the right.³ But in the second place, in our view the Congress did not mean to affect major disputes at all when it included the phrase "established practices" in the status quo provision of Section 5. If one looks to Section 5 First in its entirety, he will find that since 1934, when the status quo provision was also added, the statute has provided for mediation in two classes of cases: "(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference," and "(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." It seems fairly apparent that the status quo provision relates to class (a) in requiring no change to be made in "rates of pay, rules, or working conditions," and relates to class (b) in adding, in the disjunctive, "or established practices." The Act consistently refers to changes in "rates of pay, rules, or working conditions" where major disputes are concerned, without any reference to "established practices." This is true not only in Section 6 and Section 5 First (a), but also in Section 2(4), Section 2 First and Section 2 Seventh.⁴

³ We note that the word "established" in the phrase "established practices" must add something beyond the continuation of a course of conduct over a period of time or it would be superfluous, since, as reference to any standard dictionary will demonstrate, "practice" itself means, essentially, a continued course of conduct.

⁴ Moreover, the only explanation in the legislative history concerning the status quo provision in Section 5 supports our view. The status quo provision in Section 5 was added to Section 5 in 1934 to fill the hiatus between the status quo provisions of Sections 6 and 10 left by the 1926 Act. Joseph B. Eastman, Federal Coordinator of Transportation, the principal draftsman and proponent of the 1934 amendments, testified: "As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order

b. But whether we or the unions are correct in our respective views of Sections 5 or 10 is not really material in this case, and accordingly need not be decided by the Court. Even if the Congress intended Sections 5 and 10 to impose somewhat broader obligations than we believe, there would be no basis for inferring that the Congress intended also that Section 6 be co-extensive. On the contrary, the only policy considerations that might be deemed to support a broader interpretation of Sections 5 and 10 are inapplicable to Section 6.

These policy considerations focus upon critical differences between these provisions in terms of the time periods during which they are applicable and the points in the negotiating process at which they come into play. Because of these differences, it might be not unreasonable to suspend in some fashion contractual rights under Sections 5 or 10; but it would be most unreasonable to suspend them under Section 6. Thus, the status quo provision of Section 6 becomes applicable at the very first stage in negotiations, when a proposal to change an agreement is first made, and remains applicable through the conferences and mediation prescribed by Sections 5 and 6. That period of time is frequently a year or two, is not infrequently longer, and is "purposely long and drawn out, based on the hope that reason and practical considerations will provide in time

by the President appointing a fact-finding board and maintaining the status quo for 30 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike vote prior to the termination of mediation, obviously a very unsatisfactory expedient, so as to enable the Board of Mediation to certify to the President that an interruption to interstate commerce threatens, thus enabling him in turn to issue an executive order before the railroads can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole." *Hearings on S. 3266 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess., p. 21 (1934); see *American Airlines, Inc. v. Air Line Pilots Ass'n*, 169 F. Supp. 777, 789 (S.D. N.Y., 1958).

an agreement that resolves the dispute." *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966). In contrast, the status quo provision of Section 5 is applicable only for 30 days following the termination of services by the National Mediation Board, and the status quo provision of Section 10 is applicable only for the 30-day period of emergency board proceedings and for an additional 30 days thereafter. Thus, not only are those periods of time sharply circumscribed, but they occur only in the most intractable of disputes—those in which conferences and mediation have failed to produce agreement. Those are the only disputes, of course, in which strikes and lockouts are an imminent prospect if agreement is not reached, so that the public interest in avoiding disruption of transportation is immediately threatened. Thus, they are the only disputes in which the public interest may arguably be deemed to justify serious encroachments upon the parties' contractual rights and the carrier's freedom to make needed operational changes. Even if we assume, as the unions argue, that the Congress determined, during these crucial periods, to impose more stringent limitations upon changes than are imposed by the rules established by the parties' agreements, there is no basis whatever for concluding that the Congress also intended to wipe out the right of the carriers to take actions authorized by the collective bargaining agreements during the entire course of negotiations simply because a union has mailed out a proposal to change the agreement. It offends common sense to believe that the Congress intended such interference with the parties' contractual rights during the indefinite, but prolonged, period to which the status quo provision in Section 6 is applicable.

In short, however Sections 5 and 10 are viewed, neither their language nor their legislative history affords the unions any support in this case.

2. *Precedents.* In their briefs, the unions have cited a number of cases in connection with their discussion of the status quo provisions of the Railway Labor Act (Resp. Br. pp. 19-26; R.L.E.A. Br. pp. 21-22). Of these, only three involved the question presented here and they are not persuasive.⁵ A fourth, *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir., 1964) supports the Shore Line, not the unions. (See our opening brief at pp. 10-11, 14-15.) The rest of the decisions cited by the unions are directed to showing that "the *status quo* requirements of the Act [are] equally binding on both parties, carriers as well as employees" (Resp. Br. p. 25).⁶ Of course they are, but that is irrelevant. The issue here is not whether the Shore Line is subject to the status quo provisions of the Act, which it

⁵ Two of these—*Spokane, Portland & Seattle R. Co. v. Order of Railway C. & B.*, 265 F. Supp. 892 (D. D. C., 1967), hearing on final order, Pet. App. 64a-67a; and *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers*, 299 F. Supp. 1278 (N.D. Ill., 1969), *appeal pending*, No. 17712 (7th Cir.)—are discussed in our opening brief at p. 27, n. 12. In the third—*Chicago & W. I. R. Co. v. Brotherhood of Clerks*, 221 F. Supp. 561 (N.D. Ill., 1963)—the Clerks Union advanced contentions similar to the unions' contentions here but the Court's conclusions with respect to those contentions are unclear.

⁶ See *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 725 (1945) (Resp. Br. pp. 19-20); *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284 (1963) (Resp. Br. p. 20); *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238 (1966), *affirming in part and reversing in part* 336 F.2d 172 (5th Cir., 1964) (Resp. Br. p. 20); *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 385 F.2d 581, 597 (D. C. Cir., 1967) (Resp. Br. pp. 21-22); *United Ind. Wkrs. of Seafarers I.U. v Board of Tr. of Galveston Wharves*, 351 F.2d 183 (5th Cir., 1965), 368 F.2d 412 (5th Cir., 1966), 400 F.2d 320 (5th Cir., 1968) (Resp. Br. pp. 24-25); *Atlantic Coast Line R. Co. v. Brotherhood of Rail. Train.*, 262 F. Supp. 177 (D. D. C., 1967), *reversed*, 383 F.2d 225 (D. C. Cir., 1967) (Resp. Br. p. 25); *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L.F. & E.*, 168 F. Supp. 911 (D. Mont., 1958), *aff'd*, 268 F.2d 54 (9th Cir., 1959); *Baltimore & O. R. Co. v. United Railroad Wkrs.*, 271 F.2d 87 (2d Cir., 1959). To these citations, respondent could well have added this Court's recent decision in *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969) ("While the [major] dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.").

clearly is, but whether the Shore Line violated those provisions by taking action allowed by the parties' agreements. The decisions cited by the respondent have nothing to do with that question, with the exceptions noted above. Accordingly we stand by the statement in our opening brief that until the decision of the District Court in this case, virtually all relevant precedent supported the long-established interpretation of Section 6, an interpretation which we believe to be correct.⁷

3. *The duty to bargain.* The unions' principal remaining

⁷ For the most part, our opening brief (pp. 18-22) deals with the points advanced by the unions in their effort to distinguish this Court's opinion in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). They make, however, two arguments that we had not anticipated. Both are wrong.

First, the unions say in effect that *Williams* is not relevant because there was no "pending demand for an agreement on the subject matter of the change. . . ." (Resp. Br. p. 26). But as the opinion discloses (*id.*, at 394, 396, 402), not only had the employees' representatives demanded an agreement respecting wages, but that was the central issue in dispute. Had the facts been as asserted by respondent, the Court in *Williams* presumably would have disposed of the matter on the uncontested ground that the status quo provision of Section 6 is inapplicable in the absence of a union request for an agreement made under that Section.

Second, the unions seem to believe that the Court's decision respecting Section 2 Seventh and Section 6 turned upon the Court's conclusion that there were individual contracts respecting wages between the carriers and each redepap (Resp. Br. pp. 27-28). In a sense that is so, but not in any sense that helps the unions here. The principle established by the Court, and the principle that is controlling in the case at bar, is that "[t]he prohibitions of § 6 . . . and those of § 2, Seventh are aimed at preventing changes in conditions previously fixed by collective bargaining agreements." 315 U.S., at 402-403. In applying that principle, the Court in *Williams* held that there had been no such changes because there had been no previous collective agreement respecting wages, but only individual agreements. In applying that principle to this case, it is equally clear that the carrier did not propose any changes "in conditions previously fixed by collective bargaining agreements," but on the contrary was exercising its contractual rights.

With respect to respondent's attempt to distinguish *Hilbert v. Pennsylvania R. Co.*, 290 F.2d 881 (7th Cir., 1961), *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir., 1962), and *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F.2d 973 (7th Cir., 1968) (Resp. Br. pp. 29-30), see our opening brief at p. 25, n. 11.

contention is a contention that has not been made before in this litigation. The unions contend that the decision below should be affirmed on the ground that the Shore Line violated its statutory duty to bargain (as distinguished from the status quo provision of Section 6) when it established outlying assignments during the pendency of respondent's Section 6 notice. (R.L.E.A. Br. pp. 7-16; Resp. Br. pp. 35-36.) That claim, however, was neither pleaded, proved, nor argued below⁸; there are no findings of fact that even inadvertently support it; and the record as it exists makes clear that no such findings could properly have been made.

a. The parties' duty to bargain is imposed by Section 2 First of the Railway Labor Act. Section 2 First requires the parties to railway labor disputes—

“to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier. . . .” (45 U.S.C. § 152 First.)

Respondent's Answer and Counterclaim did not allege that the Shore Line had violated Section 2 First; the pleading alleged only that the carrier had violated Section 6 (A. 14, 15, 16). Accordingly, the largely factual question whether the Shore Line exerted “every reasonable effort to make and maintain agreements” has not been litigated. It is not a question as to which either party has offered proof, and it is therefore much too late for the unions to raise it now. “[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested

⁸ See *California v. Taylor*, 353 U.S. 553, 556-557 n. 2 (1957); *United States v. New York Tel. Co.*, 326 U.S. 638, 650-651 n. 18 (1946).

with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues. . . ." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).⁹

b. Moreover, the claim that the Shore Line has violated its duty to bargain is utterly indefensible in view of facts which are of record. The record shows that the Shore Line has been bargaining with respondent over the establishment of assignments at Trenton since 1961. On February 21, 1961, when the Shore Line initially decided to establish such assignments, it notified respondent before it took action (A. 132, 148). Respondent immediately served the Shore Line with a Section 6 notice requesting an agreement as to the conditions under which the assignments would operate (A. 104, 148). In addition, respondent asked the Shore Line to defer establishment of the new assignments long enough to permit the unions to formulate detailed proposals regarding the matter (A. 133). The Shore Line agreed to that request (A. 133). After respondent had formulated such proposals, the parties negotiated at length, first in conferences, and then in mediation (A. 31-32, 105-109, 135-139, 148-149). After the termination of mediation and the establishment of the Dearoad assignments, the Shore Line made further attempts to negotiate the matter (A. 114). When that failed, respondent withdrew its Section 6 notice, on September 10, 1965, and decided to submit

⁹ The unions do not suggest that the case be remanded for the taking of evidence respecting this issue. Such a suggestion would be unwarranted. The Shore Line has been obliged since 1966 to refrain from establishing outlying assignments pending a final resolution of this litigation. "Considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end" should preclude a remand. Cf. *United States v. Atkinson*, 297 U.S. 157, 159 (1936).

the question to a special board of adjustment. (A. 114)¹⁰ Then, when the special board of adjustment decided that the Shore Line's agreements with respondent did not prohibit the establishment of outlying assignments (A. 110), the Shore Line promptly revived its plan to establish assignments at Trenton *but again notified the unions first* and invited them to inspect the proposed new facilities for the accommodation of employees at Trenton (A. 140-141). Respondent countered with a new Section 6 notice, the notice immediately involved in this case (A. 112). The parties have conferred with respect to the notice and await the assignment of a mediator (A. 42, 113, 115-119, 125-129, 149). Not until September 19, 1966—when the bunkhouse at Trenton was ready for use and additional switching was required nearby—did the Shore Line finally establish assignments at Trenton (A. 28, 42-43, 52-53, 55, 111, 150).

In view of these facts of record, the unions' new claim that the Shore Line did not bargain enough before it established the Trenton assignments is insupportable. The Shore Line has bargained over the matter for years. It has been scrupulous in giving respondent both the opportunity to be heard and the opportunity to bargain. Its action in establishing the Trenton assignments obviously has not put the issue beyond the reach of further bargaining today. The Shore Line stands ready and willing to engage in such bargaining. In short, the Shore Line has been, is, and plans to continue exerting "every reasonable effort" to settle this dispute by agreement.

¹⁰ Respondent now suggests (Br. p. 33) that it was induced to withdraw its Section 6 notice by the Shore Line's statement to the Mediation Board on February 8, 1963—*over 2½ years earlier*—that is was "no longer contemplating" the change in tie-up points that had precipitated the original Section 6 notice (A. 137). However, respondent's own communications to the Shore Line demonstrate that in fact respondent withdrew its first Section 6 notice of its own free will, because "Case No. 21 now in SBA will in all probability settle the issue of starting and tying up a crew at other than Lang Yard" (A. 114).

What then do the unions say? At root, they rely, not on the facts respecting the bargaining in this case but on a sweeping interpretation of two decisions of this Court. The *amicus* relies on *Fibreboard Corp. v. Labor Board*, 379 U.S. 203 (1964). Respondent adds *Labor Board v. Katz*, 369 U.S. 736 (1962). This Court's decision in *Fibreboard*, we are told, stands for the proposition that under the National Labor Relations Act (29 U.S.C. §§ 151-168) "a practice which is a condition of employment and so a subject of mandatory bargaining may not be changed without bargaining even though it has not been bargained previously and is not in an agreement" (R.L.E.A. Br. p. 11). *Katz*, we are told, stands for the proposition that under the N.L.R.A. "the duty to bargain collectively carries with it the requirement to refrain from unilateral action, during the bargaining process, with respect to the subject matter being negotiated" (Resp. Br. p. 35). All these supposed *per se* rules under the N.L.R.A., we are told, should be read into Section 2 First of the Railway Labor Act and were violated by the Shore Line (R.L.E.A. Br. pp. 9-14; Resp. Br. p. 36).

There is no part of the unions' argument with which we do not disagree.

i. This Court's decision in *Fibreboard* did *not* hold that a practice that is within the scope of the duty to bargain may not be changed without prior bargaining, although to be sure that is true when such action would preclude meaningful bargaining.¹¹ What the Court held, pursuant to its limited grant of certiorari in that case, was that the contracting out of work involved in the case was a mandatory subject of bargaining because it destroyed a bargaining unit, and that the Labor Board's remedial powers in-

¹¹ Even if *Fibreboard* had so held, the holding would not advance respondent's cause here, for there had been prior bargaining in this case *ad infinitum*.

clude the power to order the restoration of the *status quo ante* following a refusal to bargain when that is necessary "to insure meaningful bargaining." See 379 U.S., at 209, 215, 216. Those holdings have no relevance to any issue involved in this case; there is no dispute as to either matter. Similarly, *Katz* did not hold that "the duty to bargain collectively carries with it the requirement to refrain" indefinitely from unilateral action with respect to the subject matter of a dispute. Rather, at least as we read it, the case held that a unilateral change that "foreclosed discussion of [an] issue" (369 U.S., at 747) is not permissible during the pendency of negotiations with respect to that issue. But there is no dispute in this case with respect to that proposition; as we show elsewhere, the Shore Line has not made any change and has not taken action that forecloses discussion.

Contrary to the unions' contentions, neither *Fibreboard* nor *Katz* imposed a *per se* rule prohibiting unilateral action regardless of circumstances, under the N.L.R.A., much less throughout the "long and drawn out" procedures prescribed by the Railway Labor Act.¹² Such cases should not be read as "laying down a hard and fast rule to be mechanically applied regardless of the situation involved." *Sucesion Mario Mercado E. Hijos*, 161 NLRB 696 (1967). *Accord*, *Shell Oil Co.*, 149 NLRB 305 (1964). On the contrary, both decisions are rooted in the statutory command that parties engage in good faith bargaining—"meaningful bargaining" as *Fibreboard* phrased it. 379 U.S., at 216. Therefore, as we read *Fibreboard* and *Katz*, unilateral action is proper, either before or during negotia-

¹² Nor did any of the Court of Appeals decisions cited by the *amicus* (Br. pp. 12-13). *Per se* rules represent an "intrusion into the substantive aspects of the bargaining process" and at the very least require "specific warrant" from the statute before the Board can add to the Act's prohibitions. *Labor Board v. Insurance Agents*, 361 U.S. 477, 490, 496-497 (1960). Cf. *Labor Board v. American Ins. Co.*, 343 U.S. 395, 409 (1952).

tions, when it does not interfere with meaningful bargaining. Thus, the N.L.R.B. has held unilateral action of a number of kinds to be lawful under various circumstances —e.g., the laying off of employees, *Lasko Metal Prods., Inc.*, 148 NLRB 976 (1964), *enforced*, 363 F.2d 529 (6th Cir., 1966); the setting of production bonus rates on new products, *Frontier Homes Corp.*, 153 NLRB 1070-72 (1965), *enforced in part*, 371 F.2d 974 (8th Cir., 1967); the selling of a business to a buyer who will shut it down, *New York Mirror*, 151 NLRB 834, 841 (1965); the liquidating of a business, *McLoughlin Mfg. Corp.*, 164 NLRB No. 23 (1967); the selling of one plant and transfer of work to a distant plant, *Fruehauf Trailer Co.*, 162 NLRB 195 (1967); and the subcontracting of work, *Hartmann Luggage Co.*, 145 NLRB 1572, 1573 (1964); *Sucesion Mario Mercado E. Hijos*, 161 NLRB 696 (1967); *American Oil Co.*, 155 NLRB 639, 650 (1965).¹² The facts of this case, summarized above, demonstrate that the Shore Line's "unilateral" action did not "foreclose discussion" (*Katz*, 369 U.S., at 747) or

¹² To take still more examples, the N.L.R.B. has held that employers did not violate the duty to bargain when, prior to impasse, they implemented work rules concerning duties "within the normal area of detailed day-to-day operating decisions relating to the manner in which the work is to be performed." *Little Rock Downtowner, Inc.*, 148 NLRB 717, 719 (1964). In *Miller Brewing Co.*, 166 NLRB No. 90 (1967), the Board even acknowledged that "it may be impractical to require that no plant rules issue until a union has had the opportunity to bargain." And in *Westinghouse Electric Corp.*, 156 NLRB 1080 (1965), *enforced*, 369 F.2d 891 (4th Cir., 1966), the Board said "[B]ecause of the nature of the restaurant business . . . it is impracticable to require consultation with a union before each change in the price of any products sold. It is sufficient compliance with the statutory mandate, we believe, if management honors a specific union request for bargaining about changes made or to be made." When, as here, there is extensive bargaining either before or after the change, the Board is even more likely to approve the unilateral change. See *Fruehauf Trailer Co.*, *supra*; *Sucesion Mario Mercado E. Hijos*, *supra*; *Georgia-Pacific Corp.*, 150 NLRB 885 (1965); *Hartmann Luggage Co.*, *supra*; *Shell Oil Co.*, *supra*; *Lasko Metal Prods. Inc.*, *supra*; *McLoughlin Mfg. Corp.*, *supra*; *New York Mirror*, *supra*. See also *Hilton Mobile Homes*, 155 NLRB 873, 874 (1966), *aff'd*, 387 F.2d 7 (8th Cir., 1967).

interfere with "meaningful bargaining" (*Fibreboard*, 379 U.S., at 216). The Shore Line's action therefore was permissible under those decisions.

ii. Even if we were wrong in saying that *Fibreboard* and *Katz* did not lay down *per se* rules forbidding unilateral action pending negotiations, under the N.L.R.A., such rules nevertheless would have no place under the Railway Labor Act. This Court has cautioned against indiscriminate adoption of the N.L.R.A. rules in Railway Labor Act cases. Labor-management relations in the railroad industry have "developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act . . ." *Trainmen v. Chicago, R. & I. R. Co.*, 353 U.S. 30, 31-32 n. 2 (1957). "[T]he National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). Those cautionary statements should be heeded here, for at least three reasons:

In the first place, it is one thing for a specialized administrative agency like the N.L.R.B. to lay down *per se* rules to insure meaningful bargaining under the N.L.R.A. It would be quite another thing, however, for the nation's courts to set themselves up in the business of fashioning such rules to guarantee compliance with the requirement of Section 2 First of the Railway Labor Act that parties to railway labor disputes exert every reasonable effort to make and maintain agreements. As this Court said last Term, "Even if the task of adopting the NLRA's principles to railway disputes could be managed and implemented by an agency with administrative expertise . . . Congress has

invested no agency with even colorable authority to perform this function . . . [and] we lack the expertise and competence to undertake this task ourselves." *Railroad Trainmen v. Terminal Co., supra*, 394 U.S., at 391-392.

In the second place, it may be justifiable to impose a *per se* ban on unilateral action pending the relatively brief negotiations under the N.L.R.A. But for reasons already indicated, it would be quite indefensible to impose similar restrictions throughout the "purposely long and drawn out" procedures prescribed by the Railway Labor Act. See pp. 8-9, *supra*.

In the third place, importing a *per se* rule of the kind advocated by the unions into the railway labor arena would do violence to Section 6 of the Railway Labor Act. The *Fibreboard* duty-to-bargain argument advanced by the *amicus* is premised upon the Railway Labor Act's duty to bargain provision—Section 2 First (R.L.E.A. Br. pp. 9-10). But Section 2 First applies at all times, whether or not a Section 6 notice is pending and whether or not action is contemplated that is permitted under existing agreements. Therefore, the *amicus* has concluded, with impeccable logic, that under its interpretation of *Fibreboard*, a carrier must serve a notice before it changes a working condition even if the contemplated action is permissible under existing agreements so that no change in agreements is needed. (R.L.E.A. Br. p. 16). But while the *amicus* thus would require the service of a Section 6 notice even when the intended change does not require any "change in agreements," Section 6 provides for service of a notice of intended change only if the change is "an intended change in agreements." See *St. Louis, S.F. & T. Ry. Co. v. Railroad Yardmasters*, 328 F. 2d. 749, 753 (5th Cir., 1964). So, too, while the *amicus* would require continuation of so-called "working conditions" whether or not a Section 6 notice has been served or the Mediation Board has inter-

vened, Section 6 requires preservation of "working conditions" only in cases "where such notice of intended change has been given," etc. Thus, the argument of the *amicus* would repeal all the express limitations stated in Section 6.

In sum, the unions' new contentions as to the duty to bargain are not properly before this Court and are utterly lacking in merit.

4. Application of the unions' interpretation of Section 6. We deem it appropriate to mention one additional matter with respect to the unions' contentions. Under our interpretation of Section 6, if action is permitted under a railway labor contract, it remains permitted during the pendency of a proposal to change the contract. If action is not permitted under the contract, it remains prohibited after expiration, during negotiations for change. That is a workable test for determining the application of the status quo provision of Section 6.

The same cannot be said of the unions' contentions. The injunction entered by the District Court permits the Shore Line to operate outlying assignments at Dearoad, but not at other points (A. 154-155.) Why? Neither the courts below, nor the unions, offer us any clue. While the unions apparently are of the view that the status quo provision of Section 6 freezes certain physical facts existing at the moment when a Section 6 notice is served, they do not tell us how to determine *which* facts are frozen. When the Section 6 notice involved in this case was served in 1966, the Shore Line was operating outlying assignments. Such assignments had been operated at Dearoad but not at Trenton since 1962 and 1963.¹⁴ How did the courts below

¹⁴ The Shore Line's first outlying assignment in recent years was established at Dearoad, according to the record, in 1962 (A. 33, 36). A second outlying assignment was established at Dearoad by bulletin dated September 24, 1963 (A. 110). That assignment became the subject of Award No. 21 by Special Board of Adjustment No. 375 (A. 110).

conclude, and why do the unions contend, that the "status quo" fails to include the one such physical fact (operation of outlying assignments) but includes another such fact (operations at Dearoad but not at Trenton)? In two opinions, and two briefs on the merits in this Court, there is nothing that suggests how to choose among such facts in determining the status quo.¹⁵

The truth of the matter is that there is no rational basis for choosing among the facts that may happen to exist at the moment when a Section 6 notice is served and saying that some such facts are frozen and others are not. In these circumstances, the approach advocated by the unions can only produce wholly arbitrary results. Nothing of this kind was contemplated when the Railway Labor Act was enacted. Rather, as this Court held in *Williams v. Terminal Co.*, 315 U.S. 386, 402-403 (1942), "[t]he institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements."

¹⁵ One thing, at least, is clear. It is not hardship to the employees that determines the issue in the unions' view. Trenton is 30-33-35 miles north of the Shore Line's principal yard in Toledo, while Dearoad is another 10-15 miles up the line (A. 56). Thus, moving outlying assignments from Dearoad to Trenton imposes no hardship on employees. If anything, it advantages them.

CONCLUSION

For the reasons stated above and in our opening brief,
the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 29.—OCTOBER TERM, 1969

The Detroit and Toledo Shore
Line Railroad Company,
Petitioner,
v.
United Transportation Union.] } On Writ of Certiorari
to the United States
Court of Appeals for
the Sixth Circuit.

[December 9, 1969]

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises a question concerning the extent to which the Railway Labor Act of 1926¹ imposes an obligation upon the parties to a railroad labor dispute to maintain the status quo while the "purposely long and drawn out"² procedures of the Act are exhausted. Petitioner, a railroad, contends that the status quo which the Act requires be maintained consists only of the working conditions specifically covered in the parties' existing collective agreement. Respondent, a railroad brotherhood, contends that what must be preserved as the status quo are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement. For the reasons stated below, we think that only the union's position is consistent with the language and purposes of the Railway Labor Act.

The facts involved in this case are these: The main line of the Detroit and Toledo Shore Line (Shore Line), petitioner's railroad, runs from Lang Yard in Toledo, Ohio, 50 miles north to Dearoad Yard near Detroit, Michigan. For many years prior to 1961, Lang Yard was the

¹ 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*

² *Railway Clerks v. Florida E. C. R. Co.*, 384 U. S. 238, 246 (1966).

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terminal at which all train and engine crews reported for work and from which they left at the end of the day. As the occasions arose, the Shore Line transported crews from Lang Yard to perform switching and other operations at various points to the north, assuming the costs of transportation and overtime for the crew members. On February 21, 1961, the railroad advised respondent, the Brotherhood of Locomotive Firemen and Enginemen (BLF&E),³ of its intention to establish "outlying work assignments"⁴ at Trenton, Michigan, a point on the main line about 35 miles north of Lang Yard. These new assignments would have required many employees to report for work at Trenton rather than Lang Yard where they had been reporting. The BLF&E responded to this announcement by filing a notice under § 6 of the Railway Labor Act⁵ proposing an amendment to the collective

³ The United Transportation Union, the successor organization to the Brotherhood of Locomotive Firemen and Enginemen, was substituted as party respondent by order of the Court, March 3, 1969. Respondents also include two officers of the BLF&E named in the original complaint.

⁴ The parties treat the term "outlying assignment" as meaning a work assignment with a reporting point for going on and off duty located elsewhere than at the Shore Line's principal yard, Lang Yard in Toledo, Ohio. We adopt that usage here.

⁵ 44 Stat. 582, as amended, 45 U. S. C. § 156 (1964). Section 6, in its entirety, provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been

bargaining agreement to cover the changed working conditions of the employees who would work out of Trenton. Section 6 requires both carriers and unions to give the other party a 30-day notice of an "intended change in agreements affecting rates of pay, rules, or working conditions."⁶ Since the union thus invoked the "major disputes" settlement procedures of the Railway Labor Act,⁷ the dispute first went to conference and, when the parties failed to agree between themselves, then to the National Mediation Board.

While the case was pending before the National Mediation Board, the Shore Line announced two new outlying assignments at Dearoad, Michigan, at the northern end of the line. Because work crews could be taken by cab from Dearoad south to Trenton, the railroad concluded that it no longer needed to establish assignments at Trenton and so advised the Mediation Board. When the Dearoad assignments were announced, the union withdrew from the Mediation Board proceedings, and before a Special Board of Adjustment convened under § 3 of the Act,⁸ challenged the railroad's right under the parties' collective agreement to establish outlying assignments.

finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

⁶ See n. 5, *supra*.

⁷ A "major dispute" is one arising out of the formation or change of collective agreements covering rates of pay, rules, or working conditions. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-727 (1945).

⁸ 44 Stat. 578, as amended, 45 U. S. C. § 153 (1964). At this point, the BLF&E was considering the controversy as a "minor dispute," *i. e.*, a dispute arising out of the interpretation or application of collective agreements. Under § 3 of the Railway Labor Act such disputes are settled by an Adjustment Board whose interpretation of the collective agreement is binding on the parties. See *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-727 (1945).

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On November 30, 1965, the Special Board ruled that the Shore Line-BLF&E agreement did not prohibit the railroad from making the assignments.⁹

Relying in part on the ruling of the Special Board, the railroad notified the union on January 24, 1966, that it was reviving its plan for work assignments at Trenton. Again the union responded by filing a § 6 notice of a proposed change in the parties' collective agreement. This time the union sought to amend the agreement to forbid the railroad from making any outlying assignments at all. The parties were again unable to negotiate a settlement themselves, and on June 17, 1966, the union invoked the services of the National Mediation Board. While the Mediation Board proceedings were pending, the railroad posted a bulletin definitely creating the disputed work assignments at Trenton effective September 26, 1966. Faced with this unilateral change in working conditions, the union threatened a strike. The railroad then brought this action in the United States District Court to enjoin the BLF&E¹⁰ from carrying out the allegedly illegal strike. The union counterclaimed for an injunction prohibiting the Shore Line from establishing outlying assignments on the ground that the status quo provision of § 6 of the Railway Labor Act forbids a carrier from taking

⁹ The Special Board of Adjustment found:

"What took place here was not a change in the recognized terminal, but simply amounted to an outlying assignment. There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment." App., at 110.

¹⁰ The Brotherhood of Railroad Trainmen were also named as defendants, as were several officers of both unions. The causes of action against the two brotherhoods were completely different, however, and the cases were treated as distinct at trial and on appeal. The Brotherhood of Railroad Trainmen is not involved in the present litigation at this stage.

unilateral action altering "rates of pay, rules, or working conditions" while the dispute is pending before the National Mediation Board. The pertinent part of § 6 provides:¹¹

"In every case where . . . the services of the Mediation Board have been requested by either party . . . , rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board . . ." 45 U. S. C. § 156 (1964).

The District Court dismissed the railroad's complaint, from which no appeal has been taken, but it granted the injunction sought by the union restraining the railroad from establishing any new outlying assignments at Trenton or elsewhere.¹² The United States Court of Appeals for the Sixth Circuit affirmed the issuance of the injunction against the railroad. 401 F. 2d 368 (1968). We granted certiorari, 393 U. S. 1116 (1969).

In granting the injunction the District Court held that the status quo requirement of § 6 prohibited the Shore Line from making outlying assignments even though there was nothing in the parties' collective agreement which prohibited such assignments. The Shore Line vigorously challenges this holding. It contends that the purpose of the status quo provisions of the Act is to guarantee only that existing collective agreements continue to govern the parties' rights and duties during efforts to change those agreements. Therefore, the railroad argues, what Congress intended by writing in § 6 that "rates of pay, rules, or working conditions shall

¹¹ The full section is set out in n. 5, *supra*.

¹² The order of the District Court is unreported. *Detroit and Toledo Shore Line Railroad Co. v. Brotherhood of Locomotive Firemen and Enginemen*, No. C 66-207 (D. C. N. D. Ohio, filed Nov. 15, 1966). The opinion of the District Court on motion to vacate the judgment is reported at 267 F. Supp. 572 (1967).